No. 83-42

FILED
NOV 28
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HAGERSTOWN KITCHENS, INC.,
Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS OF WASHINGTON COUNTY

AND

WASHINGTON COUNTY DEPARTMENT OF PERMITS AND INSPECTIONS,
Respondents.

BRIEF OF THE BOARD OF COUNTY COMMISSIONERS OF WASHINGTON COUNTY AND WASHINGTON COUNTY DEPARTMENT OF PERMITS AND INSPECTIONS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PAUL V. NIEMEYER,
MICHAEL C. POWELL,
PIPER & MARBURY,
1100 Charles Center South,
36 South Charles Street,
Baltimore, Maryland 21201,
Attorneys for Respondents.

The Daily Record Co., Baltimore, MD 21202

QUESTION PRESENTED

Is it within the reasonable exercise of police power for Washington County, Maryland to enforce previously enacted building code requirements by requiring Petitioner to install a fire sprinkler system in its plant in connection with any *future* change in use, renovation or expansion of the plant?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
STATEMENT OF THE CASE	1
ARGUMENT:	
There Has Been No Unconstitutional Taking Of Property	3
CONCLUSION	5

TABLE OF CITATIONS

Cases

Berwyn Heights v. Rogers, 228 Md. 271, 179 A.2d 712 (1962)	4
Goldblatt v. Hempstead, 369 U.S. 590 (1962)	5
Lipsitz v. Parr, 164 Md. 222, 164 A. 743 (1933)	4
Penn Central Transportation Company v. City of New York, 438 U.S. 104, reh. den., 439 U.S. 883 (1978)	5
Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946)	4
United States v. Central Eureka Mining Co., 357 U.S. 155, reh. den., 358 U.S. 858 (1958)	5

No. 83-42

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HAGERSTOWN KITCHENS, INC.,
Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS OF WASHINGTON COUNTY

AND

WASHINGTON COUNTY DEPARTMENT OF PERMITS AND INSPECTIONS,
Respondents.

BRIEF OF THE BOARD OF COUNTY COMMISSIONERS OF WASHINGTON COUNTY AND WASHINGTON COUNTY DEPARTMENT OF PERMITS AND INSPECTIONS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATEMENT OF THE CASE

In 1976, when Hagerstown Kitchens, the Petitioner, began construction of an addition to its warehouse and manufacturing plant in Washington County, Maryland, it

violated existing building code requirements by failing to include in its plans an automatic sprinkler system for fire protection. Although the County issued the building permit without mentioning that requirement, Hagerstown Kitchens was expressly advised of the violation by the County shortly thereafter on two separate occasions. Despite the warnings, Hagerstown Kitchens continued construction.

On August 27, 1980, when construction was completed but a sprinkler system had not been installed, the County ordered Hagerstown Kitchens to install the sprinkler system. Hagerstown Kitchens appealed that order to the Board of County Commissioners, which, following a hearing, decided to grant Hagerstown Kitchens a limited waiver from the building code requirements, but required that a sprinkler system be installed if and when, *at some future date*, there were "changes in use, renovation of, or expansion of the structure." Still unsatisfied, Hagerstown Kitchens appealed the Board's decision to the Circuit Court for Washington County, Maryland. That appeal raised all of the issues asserted in this case by Hagerstown Kitchens, including an allegation that the Board's order unconstitutionally deprived Hagerstown Kitchens of property. After an answer was filed to the appeal, Hagerstown Kitchens voluntarily abandoned the appeal, and the Board's decision became final.

Thereafter, Hagerstown Kitchens filed a new action raising the same issues in the United States District Court for the District of Maryland, seeking relief based on 42 U.S.C. §1983 and the Fourteenth Amendment. The District Court dismissed this action, and the United States Court of Appeals for the Fourth Circuit affirmed, ruling that enforcement of a building code provision for the installation of a fire protection sprinkler system was not the taking of property, that there was no deprivation since

the order only applied to future construction, and that, in any event, the provision requiring the installation of the sprinkler system is a reasonable and constitutional exercise of police powers.

SUMMARY OF REASONS FOR DENYING THE PETITION

The writ of certiorari has been traditionally issued by this Court to decide those novel questions of law whose importance transcends the boundaries of an individual case or about which the federal courts are in disagreement. Measured against those standards, this Petition should be denied.

Whether the Petitioner can be subjected to a restriction requiring it to install a sprinkler system upon a future change in use or structure of its plant raises no constitutional question and is not a subject over which there is any disagreement among the circuits. The right to build a nonconforming structure in violation of existing laws is not a property right which is protected, and all property rights, in any event, are subject to the reasonable exercise of police powers to require fire protection. Moreover, the County in this case waived the provision with respect to the existing nonconforming structure of the Petitioner.

ARGUMENT

THERE HAS BEEN NO UNCONSTITUTIONAL TAKING OF PROPERTY

It is uncontroverted that Hagerstown Kitchens failed to comply with existing building code requirements when it constructed an expansion to its warehouse and manufacturing plant without including an automatic sprinkler system for fire protection. Despite the violation, Hagerstown Kitchens contends that the County is estopped to

enforce the building code requirement because absence of the system was not noticed before a building permit was issued. Hagerstown Kitchens contends that the later enforcement by the County, therefore, was an unconstitutional taking.

Under Maryland law, there is no property interest which can be violated or taken by enforcing a lawfully existing building code requirement. Maryland law recognizes no right to construct a structure which does not comport with existing building codes. *Berwyn Heights v. Rogers,* 228 Md. 271, 179 A.2d 712 (1962). Assuming that the requirement for a sprinkler system is a reasonable one, there can be no estoppel or waiver under Maryland law barring enforcement of a requirement of a public building code that was adopted for the benefit and safety of the public before the building permit was issued. *Berwyn v. Rogers, Ibid.; Lipsitz v. Parr,* 164 Md. 222, 164 A. 743 (1933).

Any property right, in any event, is always subject to the reasonable exercise of police powers to further the public welfare. And a regulation requiring the installation of fire sprinkler systems *in existing* structures has been held to be just such a reasonable restriction by this Court in *Queenside Hills Realty v. Saxl,* 328 U.S. 80 (1964).

In the instant case, Washington County in fact waived the building code requirement with respect to the structure completed in violation of the building code, ordering only that a system be installed in connection with *future* changes in the facility. Since, as this Court held in *Queenside Hills, supra,* it is constitutional to require installation of a sprinkler system in *existing* buildings, such installation can certainly be required for future changes.

Finally, before a court may conclude that there has been an unconstitutional taking of property, the Petitioner

must demonstrate that a regulation or restriction "deprives him of all beneficial use of the property." *Goldblatt v. Hempstead*, 369 U.S. 590, 592 (1962); *see also, Penn Central Transportation Company v. City of New York*, 438 U.S. 104, *rehearing denied*, 439 U.S. 883 (1978) and *United States v. Central Eureka Mining Company*, 357 U.S. 155, *rehearing denied*, 358 U.S. 858 (1958). No such allegation can be made in this case. On the contrary, the restriction is expressly limited to future changes in the structure.

CONCLUSION

There is no property right to build a structure which is not in conformity with an existing building code, and any property right would be, in any event, subject to the reasonable exercise of police power to require a fire protection sprinkler system. Furthermore, in this case, there was no deprivation of property since the code requirement was waived with respect to Petitioner's nonconforming structure and was imposed only for *future* changes.

The Petition should be denied.

Respectfully submitted,

PAUL V. NIEMEYER,
MICHAEL C. POWELL,
PIPER & MARBURY,
1100 Charles Center South,
36 South Charles Street,
Baltimore, Maryland 21201,
Attorneys for Respondents.

August 10, 1983